

NO. 89-1770

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOL, JR.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

TeleSTAR, Inc.,

Petitioner;

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent;

MCI COMMUNICATIONS CORPORATION,  
WESTERN TELE-COMMUNICATIONS, INC.,

Intervenors.

PETITION FOR WRIT OF CERIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA

DONALD F. BEACH  
5881 Leesburg Pike  
Suite 303  
Falls Church, VA 22041  
Telephone: (703) 931-5925  
ATTORNEY FOR PETITIONER

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(CORRECTED COPY)



## QUESTIONS PRESENTED

1. Should appellate review be "cutoff" for the reason of failure to prosecute "remanded hearings" that were probative abuse of process, and were enacted at the request of no party and despite there already existing a thorough record from three-and-a-half years of Federal Communication Commission (FCC) hearings in what were termed "exhaustive proceedings" by then FCC Chief of Enforcement Division, Gregory Vogt, who implored that "remanded hearings" would be inequitable, wasteful of government and other parties resources and would unlikely produce any relevant evidence not already adduced?

2. Does exhaustion of administrative remedy extend to unlawful proceedings that violate Fifth and Fourteenth Amendment due process and are invoked as a precursor to unprecedented FCC-sponsored settlement negotiations for a single-applicant licensee by a Commissioners triumvirate that had

shown to have vacated its function to outside influences, since when convening such negotiations the "essential element" was granting TeleSTAR its FCC licenses (and rescinding concurrent "remanded hearings") only if, in exchange (in private contracts), it would agree to demands of competitors, MCI Telecommunications Corporation (MCI) and Western Tele-Communications, Inc. (WTCI), of which the principal tenant was exculpation from antitrust litigation (now pending, Case No. 89 C-0068-S, United States District Court Of Utah, Central Division)?

3. Whether in any case, it was clear error to have avoided deciding what became the critical question, whether the single element ultimately relied upon for disqualification existed, whether TeleSTAR had, in fact, been assigned the risk of nonpersuasion in the designation order or in the "remanded order" on the presumption that it had and therefore could be defaulted on the basis of evidence the Commissioners



found impossible to resolve one way or the other, but then did so arbitrarily, when TeleSTAR refused during FCC-sponsored settlement negotiations to grant antitrust immunity to competitors, MCI and WTCI, whereupon the same "insufficient evidence" became the basis for levying the ultimate sanction of disqualification?

4. Because in related cases involving MCI's and WTCI's more egregious and "repeated" FCC violations that were decided during "closed-door-restricted proceedings" by the Commissioners using very divergent processes and standards of adjudication, inter alia, where no attempt was made to procure testimony from key witnesses but on the contrary the FCC procured their absence by conducting absolutely no evidentiary process, should review be granted to thereby delineate between what is protected administrative remedy and what constitutes violation of Fourteenth Amendment equal protection and is also inconsistent with

prior rulings for the United States Court of Appeals For The District of Columbia for equal treatment of petitioners on concurrently decided cases?

5. Should review be granted to resolve a conflict between the District of Columbia and Ninth Circuits as well as this Court on what is requisite administrative remedy or what amounts to capricious and futile "remand hearings" intended for no other reason than forcing upon TeleSTAR the alternatives of either comporting with competitor's demands to grant immunity from antitrust litigation or of becoming subjected to contrived administrative attrition while also being cutoff from judicial review of acts of the Commissioners which manifestly are not their purview?

6. Whether TeleSTAR faced a partial and biased tribunal that consistently favored MCI's and WTCI's interests and repeatedly ignored the FCC's own trial counsel's and staff's recommendations?

## A LISTING OF ALL PARTIES

Petitioner: TeleSTAR, Inc. (TeleSTAR) is not a subsidiary or has no subsidiary companies.

Respondent: Federal Communications Commission (FCC)

Intervenor: MCI Telecommunications Corporation (MCI) is not a subsidiary or has no subsidiary companies.

Intervenor: Western Tele-Communications, Inc. (WTCI), a wholly-owned subsidiary of WestMarc Communications, Inc.

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## OFFICIAL AND UNOFFICIAL REPORTS

1. TeleSTAR, Inc. v. Federal Communications Commission, D.C. Circuit Case Nos. 88-1420 and 88-1445, "Order" (denied) TeleSTAR's petition for rehearing, entered November 27, 1989.

2. TeleSTAR, Inc. v. Federal Communications Commission, D.C. Circuit Case Nos. 88-1420 and 88-1445, "Order" (denied) TeleSTAR's suggestion for rehearing en banc, entered November 27, 1989.

3. TeleSTAR, Inc. v. Federal Communications Commission, D.C. Circuit Case Nos. 88-1420 and 88-1445, "Judgment" (affirmed) entered September 22, 1989 [no published opinion pursuant to R.14(c)].

4. FCC Docket No. 85-202, Memorandum Opinion And Order, FCC 88-171, applications denied, released May 19, 1988.

5. FCC Docket No. 85-202, Memorandum Opinion And Order, FCC 88M-1113, dismissed, released April 15, 1988.

6. FCC Docket No. 85-202, Memorandum Opinion And Order, FCC 87-374, remanded for further hearings, released December 3, 1987.

7. FCC 88-24, Order and Notice of Apparent Liability, (D.C. Circuit Nos. 88-1153 and 88-1419 pending) assessed \$10,000 forfeiture on MCI Telecommunications Corporations for FCC violations, released January 25, 1988

8. FCC 89-132, Order On House of Representatives Investigation of the FCC regarding disparate treatment of petitioners in the cases of TeleSTAR, MCI and WTCI, released April 28, 1989.

## THE JURISDICTION OF THE COURT AND DATE OF ENTERING JUDGMENT

The jurisdiction of this Court is established by 47 U.S.C. 402(b)(1) and (6) (1982). The date when the District of Columbia Circuit Court of Appeals for the United States of America (D.C. Circuit) rendered its "Judgment" which denied a petition for rehearing was November 27, 1989. The petition for rehearing was filed resultant from the previous "Order" of the D.C. Circuit Court entered September 22, 1989.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be

twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws".

47 U.S.C. Section 309(e): (see Appendix)

47 U.S.C. Section 312(a): (see Appendix)

5 U.S.C. Section 556(d): (see Appendix)

## STATEMENT OF THE CASE

### Competitors Illegal Construction --- Commissioners' Disparate Treatment

In 1982 MCI illegally constructed at least two significant microwave networks. One, MCI's Glenshaw/Erie network located in the Amish Country of Pennsylvania, had construction operations commenced in the Summer of 1982. 1/ This was six months before MCI would receive any FCC authority of any kind for undertaking such construction. MCI's illegal construction of the Glenshaw/Erie network shows the distinction between its treatment by the FCC and that afforded TeleSTAR some three years

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1/ MCI was cited by the FCC and paid a \$10,000 forfeiture for numerous illegal FCC operations pursuant to TeleSTAR's petitions for revocation, which were committed over a several year period including:

(1) Five separate incidents on separate routes of illegal construction of microwave networks from 1982 to 1987; (2) Two instances on separate networks of illegal radio transmission; (3) Two instances on separate networks of illegal FCC frequency coordination; (4) Five instances of making false statements on applications.

later, when as a novitiate FCC applicant it had unwittingly undertaken illegal construction (see 6/ infra).

Within a total of nine days from when MCI's management and legal counsel requested and was granted Special Temporary Authority (STAs) pursuant to FCC 21.25(a) on December 22, 1982, to construct and operate its Glenshaw/Erie network until December 31, 1982, when MCI informed the FCC that the network was totally completed and had become operational transmitting radio signals was the extent of the time (including weekends) for the ostensible construction, testing and cutover for this facility. This involved completing an over 100-mile network with several microwave repeater site locations that each had 300-foot towers with multiple ten-foot dish antennas and waveguides attached to them.

MCI, in responsive briefs some five years later to TeleSTAR's petition for revocation, devoted a single paragraph to



explain this illegal construction, saying in effect it had all been inadvertent and the fault of construction workers. The Commissioners, too, saw fit to devote a simple paragraph in their Order (see Appendix 115) rendered not in any evidentiary process, but in "closed-door-restricted proceedings", for explanation of why MCI's serious construction violation was attributable to an inadvertent "breakdown in company communications" and MCI's management remained unapprised. It might be added, why was no hearing thought essential to find out? FCC Policy Regarding Character Qualifications, 102 FCC 2d 1179, 1218 (1986) states,

"A Corporation must be responsible for the FCC-related misconduct occasioned by the actions of its employees in the course of their broadcast employment. To hold otherwise would, inter alia, encourage corporate owners to improperly delegate future misconduct. ...Merely standing back and waiting for disaster to strike or for the Commission to become aware of it will not insulate corporate owners from the consequences of misconduct."

It seems doubtful that the framers of such Policy on Character had in mind the resulting Commissioners' penalty of payment of a paltry \$10,000 fine for extensive "repeated" violations and misrepresentations that occurred here (see 47 U.S.C. 312(a)).

During TeleSTAR's "exhaustive [FCC] proceedings" convened for a single incident of illegal construction as a would-be new competitor of MCI, MCI had stated in responsive briefs,

"...To allow TeleSTAR to benefit from its violation would signal licensees that premature construction is nothing more than a 'business risk'. The Commission will be providing incentive for businesses to build unlawfully the systems they desire, facing only a penalty should they get caught..."

MCI's position throughout this proceeding has been clear. The Communications Act and the Commission have established rules to ensure equitable use of the electromagnetic spectrum. The Commission must continue to administer those rules to ensure that each company plays by the same rules, and ensure that the communications industry is not plunged back into the cacophony of the 1920's." (emphasis is supplied)

It seems apparent that MCI was willing to take great risks including the spectrum of those afforded in violation of FCC or local regulations; did they believe they had assurances that the Commissioners would back them up and even cover-up?

At least one other MCI network was illegally constructed during 1982, MCI's Downers Grove, Illinois to Pleasant View, Illinois network. This network was another involving very unusual circumstances at the FCC. MCI commenced construction soon after filing its applications without FCC licenses and without any STA. MCI's 435 applications were filed at the FCC on May 10, 1982 and the network became operational on August 23, 1982, even though an FCC construction permit was not granted until July 7, 1982 to commence building. This 200-mile network also involved extensive construction of eight totally new microwave sites with 300-foot towers attached with multiple 10-foot dish antennas.

This incredible lack of enforcement against MCI, while holding "exhaustive hearings" and "remanded hearings" on TeleSTAR, is clearly illustrative of the Commissioners disparate treatment of petitioners in these contemporaneous proceedings, inconsistent with precedent for equal treatment for concurrently decided cases, Melody Music, Inc v. FCC ("Melody"), 345 F.2d 730, 732-3 (1965); Secretary Of Agriculture v. United States ("Secretary Of Agriculture"), 74 S.Ct 826, 831, 347 U S 645, 650, 98 L.Ed 1015, 1020 (1954); and Automatic Canteen Co. v. Federal Trade Commission ("Canteen"), 73 S.Ct 1017, 1028, 346 U S 61, 72, 97 L.Ed 1354, 1365 (1952). It also exemplifies their reluctance to hold evidentiary processes to adduce the facts on MCI in the face of unquestioned material facts, Citizens For Jazz On WRVR v. FCC ("Citizens"), 775 F.2d 392, 395-7 (1985). This was against the FCC's mandate as an enforcement agency, since the Commissioners

have at their disposal the wherewithal to elicit the facts from MCI. They simply chose not to do so, particularly as relating to possible misrepresentations. On this basis alone their deliberations on TeleSTAR's applications (D.C. Circuit 88-1420 and 88-1445) are prejudiced, Amos Treat & Co. v SEC, ("Amos Treat") 306 F.2d 260, 263-4, (1962) and Harold Winthrow v. Duane Larkin ("Winthrow"), 96 S.Ct 1456, 1464, 421 U S 35, 43, 43 L.Ed.2d 712, 720 (1975) one man or twenty in a tribunal who is biased violates 'due process' -- a fair trial in a fair tribunal is a basic requirement of "due process".

During 1985, while MCI was participating in TeleSTAR's hearing and expounding misleading statements to those adjudicating the case, to the effect that "all should play by the rules", it again was undertaking what proved to become a virtual "hornets nest" of illegal operations. This included illegal frequency coordination;

supplying certifications and other statements of fact to the FCC that were purposely false and misleading; illegal FCC construction in violation of FCC Section 21.3(b); and illegal construction without local San Bernardino County, California, building and zoning permits.

In its FCC 435 applications submitted to the FCC on June 7, 1985, MCI supplied signed certifications to the FCC that,

"Frequency coordination with other carriers has been successfully completed and a showing to this effect is included with the instant applications for construction permits".

This certification was not an innocuous mistake, it was a bold-faced misrepresentation of the facts to the Commission, since MCI was well informed of outstanding serious frequency interference cases into the down links of earth stations owned by Dickinson Cable Systems and by Chambers Cable, Inc. In 1983 MCI filed the same misleading certifications in regard to

frequency clearance with United Video. In 1981 it did the same to Southern Bell. The Commissioners response to MCI's false and misleading certifications could be predicted: in their decision, they would not make the nexus between purposely false certifications and MCI's "lacking candor" even though MCI was fined for the incident.

Another example is contained in MCI's responsive briefs where its legal counsel stated that its illegal installation of two antennas on its Sidewinder repeater site had been a mistake, since the antennas were six gigahertz antennas for which MCI claimed it did not have frequency rights-of-way. Here again, this amounted to a purposeful false statement to the Commissioners by MCI's management and legal counsel, since as TeleSTAR had shown in attachments containing relevant copies thereof, MCI did have frequency rights-of-way, termed Prior Coordination Notices (PCNs) filed for these antennas and for a microwave network

utilizing these antennas. These PCNs were on record with MCI's frequency coordination firm, Comsearch, Inc. and had been submitted in attachments to TeleSTAR's petition filed with the FCC. Yet, the Commissioners do not even mention this fact (see Appendix 116) that was repeatedly and clearly at issue and emphasized in TeleSTAR's briefs.

On MCI's Gridley and Earle repeater sites for its Sacramento to Chico, California, network it had illegally commenced construction that was actually reported and photographed in the local media, the Gridley Herald. This illegal construction for this network was also reported in two MCI internal memos involving minute planning and participation by upper echelon management and legal counsel. One of these MCI internal memos sent between its upper echelon legal counsel and management definitely belie this assumption of a compartmentalized management that was unaware of and did not participate in MCI's illegal operations,



"According to Joe Cook, construction has not stopped at Erle. Our consensus is that we should construct everything prior to stirring up dust by going in for an electrical permit. We can always, if need be, use a portable generator while the hearing process is underway. Based on your information, will this tactic work?"

This MCI memo, obtained by TeleSTAR from documents that had been inadvertently supplied in responsive briefs, was sent to Stephen Kay Smith, MCI's Senior Zoning Attorney from Richard Strom, MCI's Senior Attorney For General Counsel. Joe Cook is MCI's Director of System Engineering. This is certain evidence that these MCI top management people, not construction workers, as asserted by both MCI and the Commissioners, had planned and participated in illegal operations. MCI's management and legal counsel made deliberate preparations and carried out illegal operations to violate Yuba County, California building and zoning regulations and to mislead local officials. MCI's legal counsel and management here were preparing to "run on

generators" to avoid detection by the power company since when coming to hook-up commercial power it would have inquired about electrical and building permits, which MCI obviously did not have.

In addition, these memos depict that not only were significant persons throughout MCI's organization willing to deceive and mislead whoever necessary at Yuba County to accomplish the ends MCI had determined, but later MCI's management and legal counsel were prepared to elicit false affidavits and supply deliberate misleading and false statements to TeleSTAR and the Commissioners in responsive briefs regarding these matters. MCI claimed in such briefs that it did not know about the requirement for Yuba County building permits (OPP, n26, at 21).

When this and another MCI internal memo were brought to the Commissioners attention in a TeleSTAR brief, they claimed to have misplaced the brief, even though it was sent and signed for at FCC offices. Later after

the existence of the brief was challenged by a member of the media the Commissioners issued a supplemental decision, which ignored the significant ramifications of these MCI internal memos. They were unwilling to make any connection between the memos and their absurd conclusions that MCI's management was totally compartmentalized from any knowledge of its illegal operations which were incredibly assigned to construction workers, including multimillion dollar expenditures necessary to have built such facilities.

The Commissioners inveterate presumptions do not hold with sound logic of any reasonable interpretation of such evidence nor with their subsequent treatment of TeleSTAR such as, without explanation, dismissing concurrent documentation such as shareholders letters that Bureau staff found conclusive of TeleSTAR's innocence. This is borne out in Baltimore & Ohio R. Co. v. Aberdeen & Rockfish R. Co, Interstate

Commerce Comm'n v. Aberdeen & Rockfish R Co.  
("Baltimore"), 89 S.Ct 280, 283, 393 U S 87,  
97, 21 L.Ed 219, 229, (1968); and United  
States v. Carolina Freight Carriers ("United  
States"), 62 S.Ct 722, 729, 315 U S 475,  
482, 86 L.Ed 971, 978 (1942), administrative  
decisions must be supported by substantial  
evidence and there must be essential  
findings to support conclusions or a  
"monster which rules with no practical  
limits on its discretion" is created.

Similar events occurred on WTCI's  
illegal operations. For instance, WTCI  
accomplished illegal construction of its  
Sodrac microwave system that became  
completely operational without any record of  
issuance of FCC licenses necessary for such  
construction and operation. "FCC certified  
copies" of all station files for this route  
were obtained by TeleSTAR; no licenses  
appeared for this WTCI network. The only  
explanation offered by WTCI was to supply an  
"in-house" document without any FCC record

of receipt or acknowledgement. WTCI's unrecorded "in-house" authorization was accepted on face value by the Commissioners to expunge any illegal operation asserted by TeleSTAR, for want of which WTCI had both illegally constructed and operated this facility. Similar illegal construction of WTCI's Spokane/Coeur d'Alene network was unexplained, including a 20-day retroactive STA issued by the FCC that was several weeks short of covering WTCI's illegal operations. Affidavits and statements of disinterested third-party witnesses (including Marlin Herrick, a WTCI subcontractor, for this network) supplied by TeleSTAR were ignored and WTCI's statements were credited on face value without any evidentiary process. As in MCI's case not a single witness was called or seated to adduce the facts, (cross examination for administrative cases is required) William L. Greene v. Neil M. McElroy 79 S.Ct 1400, 1413-14, 360 U S 670, 683-4, 3 L.Ed.2d 1377, 1390-1 (1959).

## TeleSTAR's Construction And FCC Applications

TeleSTAR, a complete novice and would-be new competitor in the microwave common carrier market after being funded by \$3.5 million in private funds, partially constructed mountain-top microwave sites for what was to be its first digital network which offered advanced and first-of-its kind enhanced services to customers in the Salt Lake City/Denver region. TeleSTAR had obtained critical frequency and route clearances for its network by outside engineering consultants for radio spectrum coordination with existing users, including competitors, MCI and WTCI (there were no technical objections to TeleSTAR's network either by the FCC or competitors). In addition, TeleSTAR obtained all local and environmental clearances for its microwave network. But because it was ignorant of the necessity to do so and had not been instructed by its FCC legal counsel of the

requirement for FCC construction permits, for buildings and towers for which TeleSTAR had obtained all local building permits it unwittingly commenced site construction without FCC licenses. 2/

After first attempting to purchase TeleSTAR's network and its offer being declined, WTCI filed complaints against its would-be rival at the FCC, alleging illegal construction and a deliberate attempt to violate FCC regulations. WTCI was joined in its complaint by Mountain Bell (a U.S. West, Inc., Bell Operating Company) and MCI. Both WTCI and MCI asked for TeleSTAR's

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2/ The FCC's trial counsel Chief of Hearing Division, James O. Juntilla, and FCC Trial Attorney, Frederick Fitzgerald, in their Common Carrier Bureau Proposed Findings Of Fact And Conclusions Of Law ("CCB's Findings"), at 19, found "the very openness of the construction is persuasive that it was innocent"; this was in addition to their finding that TeleSTAR's witnesses "were forthcoming witnesses, and their denials of knowing violation are credible." On this basis they recommended TeleSTAR pay a \$5,000 forfeiture and be granted FCC licenses.

disqualification on "character grounds" alleging throughout the ensuing three-and-a-half year proceedings that "they were there to ensure that all played by the same rules". TeleSTAR's construction had been carried out in full view of the world including its competitors, MCI and WTCI.

TeleSTAR's several letters to its over fifty sophisticated shareholders that were concurrent with its illegal construction corroborate this point. For instance in the June 7, 1984, shareholders letter, at 7 (J.A. 341), it states (Appendix 174-180),

"The events ahead are: (1) Prior coordination (User Notification), (2) construction acquisitions and preparations, (3) site acquisition and formal leases on privately owned sites, (4) implementation of Phase II construction (low cost items and pre-fabrications), (5) finalization of User Notification coordination, (6) public notification, (7) FCC granting of CP and final constructions... Some preliminary constructions of towers and other items will soon be underway. After the 30-day User Coordination is over -- anticipated time-frame is mid-July some private sites will be obtained and construction phase will begin on certain sites. Upon finalization of public notification and granting of CP by the FCC the



construction process will be well underway. Tower and shelter designs are being completed now in preparation for the construction phase."

In another shareholders letter (July 14, 1984) TeleSTAR's President informed its shareholders, at 4 (J.A. 346) that,

"After prior coordination, as previously mentioned, a 435 Form will be filed with the FCC for an FCC construction permit (CP). The FCC CP will usually be granted after an additional 30-day public notice by the FCC.

Hopefully, before receiving the FCC CP, most of the private sites will be constructed which will leave 2-3 remaining sites to be completed during September after receiving the FCC CP."

There is no question, as the Commissioners later also readily admit in their Memorandum Opinion And Order ("Remand Order"), FCC 87-374, released December 3, 1987, that TeleSTAR's contemporaneous letters to shareholders readily admitted an intention to construct facilities before receiving any FCC licenses. Could there have been any motive other than ignorance for informing

fifty sophisticated shareholders who had their own legal counsel of supposed expertise on FCC matters (who had written significant FCC clauses in a shareholders agreement) that TeleSTAR was using their \$3.5 million investment to illegally construct sites (several of TeleSTAR's outside investors were involved in the decision to construct its sites)? The Commissioners were to state in the "Remand Order", at 8 (J.A. 947-8), that "at first blush" such shareholders letters were convincing, but they never go further in their "Remand Order" to state why such contemporaneous documents are not conclusive. FCC trial counsel and staff, including FCC Chief of Enforcement Division, Gregory Vogt, were convinced of the probative value of such evidence to establish TeleSTAR's innocence (see Vogt's brief -- Appendix 171-182).

## **The Hearing Designation Order And FCC Hearings**

The FCC issued a hearing designation order Notice of Apparent Liability And Order Designating Applications For Hearing ("Designation Order"), released June 21, 1985, designating TeleSTAR's applications for hearing. Prior to this time the FCC had rendered a decision, that without saying so had effectively relegated the FCC construction authority to a ministerial act. In King Country B/casters v. FCC ("King"), 55 RR 2d 1591 (1984), an entire system including radios was constructed without FCC licenses, but no FCC forfeiture resulted, even though competitors, as herein, had asserted "lack of candor" with the FCC.

In Christian Broadcasting of The Midlands, Inc. v. FCC ("Christian"), 60 RR 1391 (1986) the FCC distinguished the illegal construction that had been given the benefit of its interpretation in King. Yet both Eagle Telecommunications v. FCC

("Eagle") 59 RR 2d 1243 (1984) and Pappas Telecommunications in "Christian" were given the benefit of "King".

TeleSTAR's case, however, which fell within the intervening time period (between King and Christian) was given the ultimate sanction of disqualification requested by competitors, MCI and WTCI, who did not avail themselves to ensure that Eagle "played by the same rules". Surprisingly in Eagle, which had not halted its construction but placed its illegal system into operation and defied the FCC's cease and desist order, and even though competitors in Eagle asserted Eagle's defiance as further demonstrative of "bad character", it was granted FCC licenses upon payment of a \$20,000 forfeiture.

TeleSTAR's case is distinguishable in FCC precedent for receiving disqualification (even though a new entrant) for matters involving a construction violation, including when character issues are designated by competitors as issues, such as

the above cases and also in the cases involving MCI and WTCI, who committed such violations extensively as seasoned licensees of twenty years or more.

The Designation Order from the Bureau explicitly allocated to TeleSTAR the burden of proceeding with evidence on all factual and conclusory issues, but allocated the burden of proof to TeleSTAR only on conclusory issues. Designation Order, para. 16-17 (J.A. 149-50), states,

"16. It is further ORDERED that the applications of TeleSTAR for the common carrier microwave facilities in the instant case ARE DESIGNATED for hearing in accordance with Section 309(e), upon the following issues:

(1) To determine the facts and circumstances surrounding the construction by TeleSTAR of the facilities for which it has applied for construction authority;

(2) To determine, in light of the evidence adduced above,

(a) Whether TeleSTAR constructed the aforementioned facilities in violation of Section 21.3 of the Commission's rules, 47 C.F.R. 21.3, and whether such construction was effectuated with the knowledge that the construction was in

violation of Section 21.3(b) Whether  
TeleSTAR is qualified to be a  
Commission licensee;

(d) Whether a grant of TeleSTAR's  
applications would serve the public  
interest, convenience and necessity;

(e) Whether, in light of the  
determination of Issues (2)(d), an  
Order of Forfeiture should be issued  
pursuant to Section 503 of the Act, 47  
U.S.C. Section 503 and Section 1.80 of  
the Commission's Rules, 47 C.F.R.  
Section 180 in the amount of \$5,000 or  
whatever lesser amount is determined to  
be appropriate.

17. It is further ordered that  
TeleSTAR shall have the responsibility  
to adduce evidence on the issues set  
forth above, and that the burden of  
proof on the conclusory issues set  
forth above shall be placed on  
TeleSTAR. 19"

Despite the language in the Designation  
Order, ALJ Miller and the Commissioners  
presumed that TeleSTAR had the burden of  
nonpersuasion on all issues not just the  
conclusory issues, i.e., whether a grant of  
TeleSTAR's applications would serve the  
"public interest".

## **Proposed Findings Of The FCC Common Carrier Bureau**

After four days of hearings referred to later by FCC Chief of Enforcement Division, Gregory Vogt, as "exhaustive proceedings" the Common Carrier Bureau, who had designated the case for hearing in the first place, and whose delegated duties include advising and making recommendations to the Commission in adjudicatory proceedings [47 C.F.R. Section 0.91(a)] stated through two experienced trial counsel who heard testimony and observed TeleSTAR's witnesses, that TeleSTAR's principals' testimony had been "forthcoming", "sincere" and "credible". FCC trial staff also concluded that predesignation pleadings which may have been interpreted to mean that TeleSTAR read and disingenuously interpreted the rules were improvident or in error. Based on this the Bureau recommended a grant of TeleSTAR's licenses, but also asked for payment of a \$5,000 forfeiture (see n1, supra).

## **Initial Decision**

In a long Initial Decision full of errors and omissions in a analysis, the ALJ essentially ignored the Bureau's findings and instead adopted MCI's and WTCI's findings; he branded the same TeleSTAR witnesses the Bureau had believed as consummate liars, who the ALJ represented, aside from anything in the record, would run stop signs and red lights with "knee-jerk" consistency if enforcement officers were not present.

## **TeleSTAR's Exceptions**

Being careful to document every assertion in detail, TeleSTAR did not take lightly its burden of demonstrating that ALJ Miller's reasoning was faulty and that he prejudged the facts, reasoning backwards to arrive at his foregone conclusions.

The Review Board begrudgingly agreed with the Chief of the Common Carrier Bureau



that TeleSTAR did point to several negligent errors and at times evidentiary errors in the Initial Decision, but even though stating that it wanted to "draw the same conclusion the Common Carrier Bureau drew here rather -- at least in their proposed findings" the Review Board [during oral argument, Chairman Marino, at 1202, (J.A. 856)] instead adopted MCI's and WTCI's recommendations.

Again the Bureau's recommendations were ignored even though Frederick Fitzgerald stated again in oral arguments that TeleSTAR's witnesses were "forthcoming, honest and telling the truth as best they could... and that substantial evidence existed to support the Bureau's conclusions and recommendations" (oral arguments, transcript at 1235-6, 1245-6). Mr. Fitzgerald also made the startling admission that even though he had found TeleSTAR innocent that superiors were instructing him to support denial of TeleSTAR's applications

(oral arguments, transcript at 1241-2),

"I have been instructed by the Bureau to support the decision [Initial Decision by ALJ Miller] and to support denial of this application... My instructions frequently come from an interpreter of the oracle. I simply get the word to go this way"

James O. Juntilla, FCC Chief of Hearing Division, had retired, but Fitzgerald's incredible admission that superiors were instructing him to support denial of parties whom he and Mr. Juntilla had found "honest, forthcoming and telling the truth as best they can", was another indication of violation of due process that became a harbinger of things to come.

Gregory Vogt's brief to the Review Board in support of TeleSTAR's applications was ignored in the Review Board's Decision written by Board Member Blumenthal.

#### **Review Board's Settlement Offer And Decision**

Review Board Member Blumenthal offered TeleSTAR its licenses if it would agree to

excise the "Stewarts" from any ownership and after that offer was declined, made another offer to rescind ALJ Miller's decision if TeleSTAR would refile its licenses (J.A. 880-6). No apparent reason existed for refiling TeleSTAR's applications unless for the concern by Member Blumenthal admitted during oral arguments that he was interested about the antitrust ramifications of TeleSTAR's case (oral arguments, transcript at 1233),

"I, for one --- it may be interesting, it may not. In Antitrust Law. They could be waiting -- we always talk about these waiting in the wings doctrines, either the investors or the interested parties waiting in the wings."

This concern first expressed by Member Blumenthal became more apparent as FCC proceedings continued.

These unusual proceedings have made strange bedfellows: Board Member Blumenthal found himself supporting the Initial Decision by ALJ Miller although previously

calling for the ALJ's resignation because he was unfit in Las Americas Communications, Inc. v. FCC, 101 FCC 2d 728 (1985); the ALJ who previously had adopted FCC trial counsel's recommendations and received praise from the Commissioners, Mobilfone v. FCC, 96 FCC 2d 673, instead in TeleSTAR's case, totally ignored FCC trial counsel and adopted MCI's and WTCI's recommendations.

#### **Application For Review**

TeleSTAR sought review by the Commissioners on February 9, 1987. The Bureau initially filed a brief in support of TeleSTAR's review stating that (J.A. 918),

"...the Review Board made errors of substantive and procedural law".

This brief was withdrawn by Gregory Vogt's superiors. TeleSTAR protested this bizarre suppression of Vogt's brief. Evidently in regard to pending House Congressional investigations by John Dingell's Subcommittee on Oversight and

Investigations 3/, Vogt's brief in a new version that cited concurrent cases (of MCI's and WTCI's FCC violations) pending at the Commission was refiled with the Commissioners. In this brief once again, the Bureau advocated that TeleSTAR's witnesses were credible and that substantial evidence suggested a grant of FCC licenses. No party to the proceedings made any suggested or sought remand hearings on TeleSTAR's case.

### **The Commissioners' Remand Order**

Ten months after TeleSTAR filed for review the Commissioners filed their "Remand Order" on December 3, 1987, and found it impossible to resolve the case one way or the other. The problem was they found the

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3/ Subsequent to failed FCC-sponsored settlement talks in August 9, 1988, a bipartisan investigation of the FCC regarding the cases of TeleSTAR, MCI and WTCI was empaneled by the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives, (see Appendix 159-68).

evidence was "insufficient" to either convict or grant the applications (this base on their presumption that TeleSTAR had all the burdens, including the burden of nonpersuasion).

Even though TeleSTAR had pointed out in its application for review that it did not have the burden of nonpersuasion 4/, only

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4/ - When the burden of nonpersuasion is assigned to a party it has a significant outcome on determination of a case, particularly for negating all factual elements when charged with serious wrong Lawrence Speiser v. Justin A. Randall v. City and County of San Francisco ("Speiser"), 78 S.Ct 1332, 1342, 357 U S 513, 523, 2 L.Ed.2d 1460, 1470 (1958). This Court has held that an agency may issue a disciplinary order only when supported by "substantial evidence", Charles W. Steadman v. Security and Exchange Commission, ("Steadman"), 101 S.Ct 999, 1006, 450 U S 91, 98, 67 L.Ed.2d 69, 76 (1981); Baltimore, 89 S.Ct 283; United States 62 S.Ct 729. In ordinary usage, i.e., except in rare cases where the burden of proceeding with proof, is under consideration, the words "proof" and "prove" refer to the latter, 5 U.S.C. 556(d) of the APA reading "burden of proof" as referring only to the burden of proceeding, which TeleSTAR does not argue it had. Similarly 556(d) provides that the proponent of a rule or order has the burden of nonpersuasion. Simply because the (4/ continues...)

the burden of supplying the evidence, and the burden of proof on conclusory issues, the Commissioners did not even address the question.

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(4/ continued...) Designation Order did not assign the burden of nonpersuasion to another party does not mean it was assigned to TeleSTAR. 47 U.S.C. 309(e) states that in cases where, as here, petitions to deny have been filed the Commission will determine the burdens, this is particularly crucial where serious character issues are present -- compare the treatment of MCI's and WTCI's cases. In United Scenic Artists v. NLRB, 762 F.2d 1027, 1034 (1985) it was held that a statutory requirement was not satisfied by administrative presumption, an agency is not free to ignore statutory language by making assumption on grounds of policy. In addition, it has not been the FCC's precedent to assign the burden of nonpersuasion to one charged with serious character issues that are potentially disqualifying D And E B/casting, 1 FCC 2d 789 (1965). Shifting the burden of nonpersuasion, ipso facto because the burden of proceeding with evidence was assigned to the applicant, is not availing, especially where, as here, the burden of nonpersuasion becomes the single element leading to the ultimate sanction of disqualification, while based on "insufficient evidence". In the Designation Order TeleSTAR was assigned the "burden of proof" only on the "conclusory issues" not on the factual issues; this delineation is well understood in FCC practice, Calhoun County B/casting, 104 FCC 2d 27 (1986); Martinez & Associates, FCC 86D-56 (1986), at 2, and was at issue here because of the allegations of MCI and WTCI.

The Commissioners did acknowledge as the Review Board noted and TeleSTAR had asserted all along that the ALJ had reasoned backwards from a predetermined presumption of guilt to arrive at demeanor findings that were non-existent ("never made").

Initially, the Commissioners dismissed as insignificant in themselves TeleSTAR's former counsel's statements using "proposes to construct" language 5/ in the "public interest statement" which was not ever seen by TeleSTAR's principals in advance of counsel filling the applications. The

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5/ One matter treated as inconsequential in the "Remand Order" but treated quite differently in the Commissioners "Final Order" denying TeleSTAR's applications on the basis of previously "insufficient evidence" was the "proposes to construct" language appearing only in documents prepared by TeleSTAR's former counsel and not seen by company principals before it was filed with the FCC in TeleSTAR's 435 applications. These words were not viewed at all by principals until after the matter was designated for hearing. Indeed, former counsel in Opposition pleadings to WTCI's complaints used the "proposes to construct" language blithely when referring to the network which counsel by then of course knew was already constructed (except for radio (5/ continues...))



Commissioners also had noted that while it thought TeleSTAR had changed from knowing about the rules to losing sight of the requirement for construction, it did not

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(5/ continued...) installations). The Commissioners biased scrambling to convict TeleSTAR is appallingly evident here in matters it previously found inconsequential, but then after-the-fact of failed FCC-sponsored settlement with competitors such inconsequential and fully explained events were used for a guilty verdict. By contrast similar "proposes to construct" language was used when referring to MCI's Glenshaw/Erie network (see Glenshaw/Erie supra) in two separate STA requests sent to the FCC in December, 1982, by MCI. These STA requests were signed by both MCI counsel, John Wells King, and Senior Vice President, Thomas Leming, even though, as MCI later admitted and was found by the Commissioners in their order and notice of liability, MCI had commenced critical FCC construction in violation of 21.3(b) during October, 1982; this was for a network that was completely operational on December 31, 1982. The Commission not only did not take any notice on this occasion that misrepresentations were apparent, but none was taken even after when during the FCC's "closed-door-restricted proceedings" for MCI such violations had been made known by TeleSTAR. The Commissioners, evidently, here and in many other instances, did not want to know why misrepresentations were supplied by MCI's legal counsel and senior management. This is another example among many depicting the patently disparate treatment of petitioners throughout these concurrent proceedings, Melody, at 732-2; Secretary of Agriculture, at 74 S.Ct 831.

have a copy of the Part 21 Rules prior to completing construction nor did the record indicate anyone had ever told it about the 21.3 construction prohibition. They noted that TeleSTAR was supplied a copy of the Rules after its construction was already essentially complete (with exception of installation of radios) on the eve of filing its 435 Applications by counsel. They castigated TeleSTAR for certification practices they said were "sloppy", but noted TeleSTAR was unlikely to have "lacked candor" when filing 435 Applications, since as the record showed no one had informed TeleSTAR on FCC prohibitions contained in Section 21.3 before that time.

The Commissioners demonstrated their underlying inconsistency, pervasive throughout the "Remand Order", when they inexplicably invited additional hearings before ALJ Miller to not only allow his revamping of previously "faulty demeanor findings", but to further adduce evidence on

all the issues, which earlier they had found were inconsequential.

The Commissioners never expressed any of the practical concerns in "Remand Order" that were subsequently pointed out by the Bureau, that witnesses after four years would unlikely remember testimony any better, and if they did it might be suspect; that such hearings would be "wasteful of the government's and other parties' resources; and unlikely produce any relevant evidence not already adduced" (see Appendix 178-82, Gregory Vogt's Comments On Petition For Reconsideration).

The most significant aspect expressed in the "Remand Order" was the apparent concern by the Commissioners of obtaining "demeanor findings" and they invited ALJ Miller to a "second bite of the apple" to reinvent "demeanor findings" to properly convict TeleSTAR aside from his foregone conclusions of guilty knowledge. Despite the Commissioners' apparent consternation they

were not without resources to have decided the case then, collateral demeanor findings existed from two experienced FCC counsel, including the Chief of Hearing Division, James O. Juntilla, and FCC Trial Attorney, Frederick F. Fitzgerald who had been present during the entire hearing and had made demeanor findings; see Moss v. Ross, 687 F.2d 604, 607 (1975), evidence of record can supplant credibility findings.

#### **Petition For Reconsideration**

TeleSTAR promptly filed a "Petition For Reconsideration" of the "Remand Order" on December 28, 1987, pointing out that the Commissioners were under a misapprehension as to the allocation of the burden of nonpersuasion, adding that the burden of proceeding on all issues had been assigned to TeleSTAR, but that it had the burden of proof only on conclusory issues but not the burden of proof on factual issues.

TeleSTAR pointed out the inconsistency in the Commissioners' findings and subsequent inconsistent requests for adducing further evidence, matters already concluded as inconsequential or fully explained, such as the finding that TeleSTAR had received the rules only on the eve of filing its 435 Applications, after completing construction of its sites, but then calling for additional evidence of why TeleSTAR took the position that it was ignorant of the rules prior to construction.

The Bureau supported TeleSTAR's position in its "Comments On Petition For Reconsideration" and was perplexed by any need for "Remand Hearings" in consideration of previously "exhaustive proceedings". The Bureau implored the Commissioners that determination of TeleSTAR's case "would not be enhanced or assisted by receipt of additional evidence" that remanded hearings called for by the Commissioners would be "inequitable and unfair, in light of

TeleSTAR's Chapter 11 Bankruptcy"; "wasteful of government and other parties resources"; and "unlikely produce any relevant evidence not already adduced". In addition, in a supporting brief the Bureau assured the Commissioners,

"The original hearings in this matter delved into the potential evidence in great detail and required the expenditure of considerable resources by this agency and the parties. The Bureau conducted a thorough examination of the record in light of the concerns expressed in the Remand Order. We continue to believe, as we did in our Proposed Findings Of Fact and Conclusions Of Law (Dec 19, 1985) that the record provides an adequate basis for a finding that grant of TeleSTAR's applications would serve the public interest."

The Bureau also reiterated that TeleSTAR's witnesses were "forthcoming, credible witnesses". The Commissioners, as admitted, in their "Final Order" (see Appendix 16-17) held up any determination on TeleSTAR's "Petition For Reconsideration" pending the outcome of FCC-sponsored settlement negotiations between TeleSTAR, MCI and WTCI.

## Remand Proceedings

In the meantime, ALJ issued a further prehearing order (December 10, 1987) and then a supplemental further prehearing order (December 17, 1987). In the first he acknowledged his duty to make demeanor findings if he could, and seemed to suggest that he might be able to do so based on notes. In the second he volunteered his interpretation of the Commissioners' invitation as an ultimatum to produce again every witness that it had already produced in addition to scores of others identified only by classification in one of twenty categories, all with a view to carrying its onerous burdens. The ALJ sua sponte blocked out thirteen days to hear evidence from what would amount to over one-hundred-twenty witnesses in his various categories.

The Commissioners could not have missed the fact that prior to issuance of the "Remand Order" TeleSTAR was proceeding in Chapter 11 Bankruptcy and had been for

several years resulting from extensive protracted FCC proceedings. The very divergent processes in the concurrent proceedings of TeleSTAR, MCI and WTCI are utilization of evidentiary processes not for adducing evidence, but rather as threatened punishment to extract demands for competitors, Morgan V. United States ("Morgan"), 58 S.Ct 773, 775, 304 U S 1, 3, 82 L.Ed 1129, 1131 (1938) rudimentary requirements of fairplay necessary in administrative quasi-judicial proceedings to maintain public confidence; Boyd S. Leedom v. William Kyne ("Leedom"), 79 S.Ct 180, 185, 358 U S 184, 189 (1958), Congress requires judicial protection of courts against agency's actions in excess of delegated authority.

No party offered any new evidence at the "Remanded Hearings", TeleSTAR in advance stated it would attend the hearing but had no additional evidence not already adduced.



The primary reason for the Commissioners' "Remand Order" for allowing the ALJ to correct his failure to make "demeanor findings" was put to rest since ALJ Miller stated explicitly at the hearing that he had not observed any adverse demeanor in any of TeleSTAR's witnesses but based his credibility findings on other matters he understood in the record (hearing Tr. 1270-1).

Then, despite Gregory Vogt asking on behalf of the Bureau that the ALJ consider the anticompetitive result of what he was proposing and that no party had further evidence to adduce, ALJ Miller proceeded to dismiss TeleSTAR's applications for alleged "lack of prosecution". This was not before the ALJ referred to ongoing FCC-sponsored settlement negotiations as "star-chamber settlement proceedings before none other than the Commissioners general counsel".

## Settlement Negotiations

If not before, by letter of January 5, 1988, when FCC-sponsored settlement negotiations on TeleSTAR's applications were requested between all parties of TeleSTAR, MCI and WTCI, the Commissioners' true motive for calling "Remand Hearings" on TeleSTAR was revealed. A settlement meeting in FCC offices ensued before the Commissioners General counsel, Bureau counsel, and counsel for TeleSTAR, MCI and WTCI. A "cessation of all hostilities" was required by TeleSTAR for successful outcome of the negotiations (see letter of March 3, 1988 from Howard Wilchins, Deputy Chief of Enforcement Division -- Appendix 183), i.e., TeleSTAR would receive its FCC licenses by agreeing in private contract to MCI's and WTCI's demands, the principal of which was rescinding antitrust potential. This rendered the Commissioners' "Remand Order" a farce, since FCC-settlement negotiations were not to adduce further evidence on the

questions the Commissioners had determined, and in convening such meetings it must necessarily be presumed that TeleSTAR's character had not undergone chameleon-like changes from "bad" to "good". This, by any measure, was a flagrant abuse of process and a violation of "due process", TeleSTAR was before a tribunal without safeguards and without trial and was being forced to barter for property rights (antitrust litigation) threatened by "Remanded Hearings". The Commissioners had created the specter of an administrative monster running amuck with its discretion, in the very least, bartering FCC licenses to those it later found of "bad character". In either case, this is a flagrant abuse of discretion and process, Federal Trade Commission v. Raldam Co. ("Federal"), 51 S.Ct 587, 590, 283 U S 643, 646 (1931); John P. Peters v. Oveta Culp Hoppy ("Peters"), 75 S.Ct 790, 797, 349 U S 331, 338 (1955); Motor Vehicle Manufacturers Of the United States; Consumer Alert; and

United States Department of Transportation

v. State Farm Mutual Automobile Insurance

("Motor Vehicle"), 103 S.Ct 2856, 2869, 463

U S 29, 42, 77 L.Ed.2d 443, 456 (1983).

Board Member Blumenthal's concerns on antitrust against MCI and WTCI were now being fully addressed by the Commissioners themselves, as attested by affidavit of MCI's counsel, John Wells King, who was present at the settlement negotiations (see Appendix 190-91),

"...When the trial staff and TeleSTAR sought MCI's imprimatur on a settlement providing for licensing a company that the ALJ and Review Board found unfit and that MCI considered unfit, MCI declined to give such imprimatur without the assurance from TeleSTAR of a complete cessation of hostilities in all forms. At the outset of the negotiations, MCI was not aware that TeleSTAR wanted to reserve the right to initiate antitrust litigation challenging MCI's successful advocacy in the FCC proceedings, but MCI's express desire for a complete cessation of hostilities at least implicitly covered TeleSTAR's release of any such claim. MCI explicitly requested such a release as soon as TeleSTAR made its intention clear"

In fact, TeleSTAR had not initiated

antitrust proceedings against either MCI or WTCI at the time. Antitrust complaints were filed almost a year later in United States District Court, Central District For The District Of Utah, in January of 1989 (No. 89-C-0068-S).

When TeleSTAR refused to grant MCI and WTCI private agreements for rescinding antitrust litigation the FCC-settlement negotiations were ended; a few months thereafter, the Commissioner found TeleSTAR guilty and denied its applications on the basis of evidence which previous to failed settlement negotiations they had found "insufficient" to convict.

#### **Commissioners' Decision On MCI And WTCI**

The case involving MCI's extensive FCC violations (1/ supra) had been determined earlier in January, 1988, prior to the FCC-sponsored settlement negotiations. MCI was found to have committed extensive FCC violations, but these "repeated" violations

were found "inadvertent" by Commissioners who ended up giving MCI a meaningless \$10,000 forfeiture. The Commissioners ignored MCI internal memos and statements of TeleSTAR witnesses that showed otherwise, including that of Steven Lance, a Chief County Building Inspector who observed respecting MCI's violations of not obtaining local building permits,

"MCI's failure to secure permits was a deliberate attempt to circumvent the law"

No evidentiary process was ever convened by the Commissioner to adduce evidence on illegal operations for which it had been cited and fined, but instead the Commissioners accepted every MCI representation on face value even when controvened by inexorable evidence to the contrary, such as MCI internal memos, PCNs from Comsearch, false certifications, false statements on STAs and 435 Applications, and testimony of disinterested-party witnesses

supplied by TeleSTAR, including local officials.

The case involving WTCI's violations was still pending at this time, the Commissioners seemed to go from vacillating between whether or not it would issue an order to cite WTCI for FCC violations; they finally decided to avoid any citations by disregarding the testimony of TeleSTAR's witness Marlin Herrick, who had been a WTCI subcontractor. This Commissioners' decision was rendered in November of 1988. Both these decisions are pending before the D.C. Circuit Court (MCI's cases are D.C. Circuit Nos. 88-1153 and 88-1419; WTCI's case is D.C. Circuit No. 88-1834).

#### **The Commissioners Final Decision On TeleSTAR's Applications**

On May 19, 1988 after failed FCC-sponsored settlement negotiations were terminated and TeleSTAR had filed for direct Appeal, dated April 22, 1988, the Commissioners pronounced TeleSTAR's

"Petition For Reconsideration" moot, but granted and considered it anyway and released their Memorandum Opinion and Order, FCC 88-171, denying TeleSTAR's applications.

This was even though the primary and ostensible reason for calling for the Commissioners' "Remand Hearings" had been addressed, since ALJ Miller admitted that TeleSTAR's witnesses had not exhibited any adverse "demeanor". This should have tipped the scales of justice; it did nothing.

#### **Subcommittee Investigation**

On August 9, 1988 The House of Representatives Subcommittee on Oversight and Investigations of the Energy and Commerce Committee empaneled investigations of the FCC regarding disparate treatment of petitioners as affecting the cases of TeleSTAR, MCI and WTCI (see Appendix 159). Several months thereafter General Accounting Office investigations of the FCC were called for (see Appendix 160).



## **Review Before The Court Of Appeals**

TeleSTAR promptly sought review of its case before the D.C. Circuit Court. Oral argument was set for September, 1989. TeleSTAR argued that the Commissioners had ignored the fundamental question of whether it had been allocated the risk of nonpersuasion. In addition, TeleSTAR pointed to the disparate treatment of concurrently decided cases; that the "Final Order" was arbitrary and capricious, since finding a guilty verdict on the basis of same inconclusive evidence; that FCC-sponsored settlement was abusive of process and intended to extract antitrust immunity; and that in any case as the Bureau had repeatedly found, TeleSTAR carried the burden on nonpersuasion successfully showing it had not intentionally violated FCC regulations.

On September 22, 1989, the D.C. Circuit Court issued its denial of review for TeleSTAR's case (see Appendix 11).

## REASONS FOR GRANTING THE WRIT

That review for TeleSTAR was cut off for failure to prosecute administrative remedies is "sacred-cow" protectionism disregarding the D.C. Circuit Court's standard for FCC treatment of concurrently decided case 6/; constitutional "equal protection" and "due process" rights 7/; and provides no oversight on out-of-control abuses such as the Commissioners' "Remand Hearing" in tandem with enactment of FCC-settlement negotiations unprecedented for a single applicant license. It represents no judicial review of an FCC showing itself in the "stagnant backwaters of caprice and lawlessness". 8/

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6/ Concurrently decided cases; and "due process", Melody, at 831-2; Winthrow, 95 S.Ct 1464, Secretary Of Agriculture, 74 S.Ct 831; Amos Treats, at 263-4.

7/ ibid, and Joseph A. Califano v. Sanders 97 S.Ct 980, 986, 51 L.Ed.2d 192, 198 (1977)

8/ Heckler v. Chaney, (Justice Marshall, Dissenting, at 734) 105 S.Ct 1649, 470 U S 821, 84 L.Ed.2d 714 (1985)

It is submitted this is critical error warranting review, but as the case now stands, there also has been no determination whether the single element, which alone would support TeleSTAR's disqualification on an inconclusive record as to actual guilt, existed. It convicts on the basis of "insufficient evidence" 9/ those whom were repeatedly found "honest, credible and forthcoming witnesses telling the truth as best they were able". It puts this question squarely (which the D.C. Circuit Court left unanswered by the Commission) whether TeleSTAR had the burden of nonpersuasion

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9/ The Commissioners themselves admit (and logically could do nothing else) in "Remand Order" that evidence was "insufficient" to grant or deny TeleSTAR's licenses, Steadman, 1001 S.Ct 1006 (disciplinary order must be supported by preponderance standard); this was even though the FCC Bureau consistently supported TeleSTAR's witnesses and evidence as conclusively innocent of charges of MCI and WTCI; the Commissioner refused to consider the anticompetitive motives, Lebanon Valley v. FCC, 503 F.2d 196, 200 (1974), cannot have myopic analysis of establishment radio station lurking in shadows to eliminate competition.

allocated, or even should have, simply because it was assigned the burden of proceeding with evidence. 10/

This simplistic technical excuse by the D.C. Court to provide judicial protectionism of recreant administrative processes flies in the face of reason and justice. It amounts to "burning draft cards" while the war rages outside, where an agency "monster" is running amuck with "administrative discretion", while special interests are being served by futile "Remanded Hearings" that "waste the government's and other parties' resources" and have been enacted not to adduce evidence but as punitive measures to force FCC-sponsored settlement by TeleSTAR to grant antitrust immunity to competitors, MCI and WTCI. In such instances the cutoff of judicial review was never intended by Congress or this Court, and

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10/ "Shifting sands" of negating all elements for charges of serious wrong is critical to the outcome, the burden of proof decides case, Speiser, 78 S.Ct 1342.

sends a chilling alarm that no sustenance will be given to those who have stood in harms way simply because they favored "due process" and fairplay 11/, whether it be a TeleSTAR, a Gregory Vogt, a James O. Juntilla or a Frederick Fitzgerald.

Judicial oversight and review of administrative decisions should be denied on only rare exceptional occasions where a preponderance of evidence suggest it was congressional intent to do so. 12/ Failure to grant review on this case is against congressional intent and judicial precedent.

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11/ Agencies can become "monsters" unless administrative discretion is checked by clear guidelines and review, Motor Vehicle, 103 S.Ct 2869; Baltimore, 89 S.Ct 283; Review by Court is essential to determine if mandate of congress is being followed, Atchison, Topeka & Santa Fe R Co. v. Wichita Board, 93 S.Ct 2367, 2374, 412 U S 800, 814, 37 L.Ed.2d 350, 357 (1973).

12/ Strong resumption of review cannot be cutoff, Clemon Barlow v. B.L. Collins, 90 S.Ct 832, 837, 397 U S 159, 164, 25 L.Ed.2d 192, 197 (1970); Bowen v. Michigan Academy, 106 S.Ct 2133, 2135, 476 U S 667, 669, 90 L.Ed.2d 623, 625 (1986).

The Commissioners "Remanded Hearings" were on face value a futile "waste of the government's and other parties' resources" as expressed to the Commissioners by competent FCC staff, Gregory Vogt, who informed the Commissioners that considerable government resources had been expended to complete TeleSTAR's hearing record in evidentiary processes that he termed "exhaustive proceedings".

It certainly did not escape the Commissioners attention that "Remand Hearings" were wasteful and inequitable 13/, they had not empaneled any evidentiary processes for either MCI or WTCI. In the

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13/ In addition to Gregory Vogt imploring the Commissioners to consider the inequity of their order because TeleSTAR was in Chapter 11 Bankruptcy and would be unable to participate in "Remand Hearings" after having been financially drained by three-and-a-half years of FCC hearings, Board Member Blumenthal spent fully 1/3 of TeleSTAR's oral arguments exploring whether or not TeleSTAR applications would be moot because of its bankruptcy proceedings, even though the FCC had been fully apprised of the Bankruptcy Court proceedings.

case of MCI they were found to have committed extensive illegal construction operations over seven years on five separate networks across the country in addition to other illegal FCC operations such as illegal radio transmission and failure to complete FCC frequency coordination, which actually harmed other users unlike TeleSTAR's violation which caused no harm to anyone and for which no technical objection was evident either from the FCC or any user.

Yet, by comparison, these same Commissioners could muster no resources to investigate MCI's or WTCI's extensive violations, Canteen, 73 S.Ct 1028 (there must be fairness not antitrust in agency dealings), as more than twenty-year licensees, they were exonerated or they paid paltry fines after specious "closed-door-restricted proceedings" that carried no semblance of judicial temperament or of adducing any relevant facts. As such proceedings unfolded they became

evident as machinations to obscure evidence and offer implausible excuses for extensive violations by twenty-year licensees caught in multiple illegal operations for which they had provided no convincing explanation. What TeleSTAR was able to investigate regarding MCI's and WTCI's violations was miniscule as a company in Chapter 11 Bankruptcy with limited resources and available sources only public records. This was the only adversarial evidence of any kind relied upon by the Commissioners who sought rather to cover the evidence than adduce it regarding MCI's and WTCI's extensive FCC violations. They did not ever issue an order to show cause but held "closed-door-restricted" proceedings inconsistent with Citizens For Jazz On WRVR v. FCC, 775 F.2d 392, 397 (1985); the Commissioners here have been shown evidence of the existence of fire for twenty-year licensees caught in serious misrepresentations and pervasive FCC



violations, yet they have been excused with paltry forfeitures and incredible reading of the evidence.

Beyond the facts evident of the purpose intended to be served and was served by the "Remand Hearings", i.e., forcing TeleSTAR to the table with competitors and if that didn't work then cutoff of judicial review for failure to exhaust remedies, these proceedings should be intrinsically exposed. That the Commissioners' "Rehearing Order" was followed upon by nearly concurrent FCC-sponsored negotiations seems probative of abuses. These events were not in any sense unrelated, or perceived as such by those closely involved, as for instance, Gregory Vogt ("wasteful of the government's and other parties' resources and unlikely to produce any relevant evidence not already adduced") and even from so unlikely a source as ALJ Miller; he perceive "Remanded Hearings" were being used to force settlement (J.A. 1000),

"There have been rumblings of star-chamber settlement proceedings conducted before none other than the Commission's General Counsel".

That the "Remand Hearings" were placed into effect with FCC-sponsored settlement negotiation as nearly concurrent events is indicative facially they were intended to serve their purposes in tandem. The implications could not be otherwise, either TeleSTAR was being subjected to perverse abuses in being denied "due process" for extracting its property by force (giving antitrust immunity to competitors in exchange for FCC licenses or be faced with "Remanded Hearings") or the Commissioners were outbartering FCC licenses to one whom they found unfit. Chameleon changes were not wrought by TeleSTAR agreeing to meet in settlement negotiations with MCI, WTCI and the Commissioners' General counsel; this did not transform it from "bad FCC character" to "good". Neither were any evidentiary changes wrought, vis-a'-vis, FCC settlement

negotiations did not adduce further evidence to allow the Commissioners to see the light regarding TeleSTAR's innocence. It materializes as a sham, and a futile process aimed at abuses directed towards serving special interest groups by use of agency power. This brought the Subcommittee On Oversight and Investigations of the House of Representatives of the United States Congress for the Energy and Commerce Committee to become involved in these proceedings to investigate the FCC disparate treatment of this and related cases involving MCI and WTCI (see Appendix 159)

It was the Commissioners' appointed duty to extend due process and follow "fair trial with a fair tribunal", Amos Treat, at 263-4, Winthrow, 96 S.Ct 1464. From ALJ Miller, to Blumenthal and finally to the Commissioners themselves this was not the case. They are reminiscent of circling buzzards that drop down once in a while to see if the victim is dead, but if not they

propose unprecedented settlements. There wasn't a modicum of a fair tribunal at any juncture of FCC proceedings with exception of a few notable individuals who attempted to stop egregious anticompetitive processes during four years of such proceedings.

The Ninth Circuit has shown clearly different standards of what is requisite administrative remedies, White Mountain Apache Tribe v. Hodel ("White Mountain Apache"), 840 F.2d 675, 677-8 (1988), exhaustion of administrative remedies not required for judicial review when such remedies are futile because of; (1) a preannounced decision; (2) administrative bias; or when there is (3) harmful delay evident. TeleSTAR submits the record clearly indicates all three elements here in its case. This Court has set forth similar guidelines for review before exhaustion of remedies: When remedies are inadequate or futile Bill Honig v. John Doe, 108 S.Ct 592, 606, 98 L.Ed.2d 686 (1988); When reasonable

facts dictate otherwise, National Labor Relations Board v. Industrial Union Of Marine And Shipbuilding 88 S.Ct 1717, 1723, 391 U S 418, 424 (1968); When determined by the judicial discretion of the court, United States v. Abilene, Co. 44 S.Ct 565, 567 (1924); when irreparable harm would result, Eccles v. Peoples Bank, 68 S.Ct 641, 645 (1947).

### CONCLUSION

For the reasons stated above, TeleSTAR respectfully requests this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals For the District of Columbia Circuit.

Respectfully submitted,

Donald F. Beach  
Counsel for Petitioner

Donald F. Beach  
Attorney at Law  
5881 Leesburg Pike  
Suite 303  
Falls Church, VA 22041

Telephone: (703) 931-5925